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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

VICKI LEWIS, ET VIR., ETC.,

Petitioners,

v.

BRUNSWICK CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF *AMICUS CURIAE* GENERAL MOTORS CORPORATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Federal Boat Safety Act of 1971 preempts a state common law requirement that recreational boats be equipped with propeller guards, where the United States Coast Guard, after extensive administrative proceedings, determined that such a requirement would be contrary to the interests of boat safety?

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BRIEF OF AMICUS CURIAE GENERAL MOTORS CORPORATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

General Motors Corporation ("General Motors") is the world's largest manufacturer of automobiles.[1]

The National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (1966), 49 U.S.C. §§ 30101-30169 (1994) (the "Motor Vehicle Safety Act") is similar in certain respects to the Federal Boat Safety Act of 1971 ("the Boat Safety Act"), under review here. The Motor Vehicle Safety Act contains a preemption clause, which states

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[1] Petitioners and respondent have consented to the filing of this brief, in letters on file in the Clerk's office. The undersigned counsel for General Motors Corporation alone have authored this brief, and no other person or entity has made a monetary contribution to its preparation or submission.

that when a federal standard is in effect, no State may "establish, or continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." 49 U.S.C. § 30103(b)(1). Moreover, like the Boat Safety Act, the Motor Vehicle Safety Act states: "Compliance with any [federal standard] does not exempt a person from liability under common law." 49 U.S.C. § 30103(e).

For that reason, the resolution of certain issues under the Boat Safety Act is potentially relevant to issues that arise under the Motor Vehicle Safety Act. General Motors thus has an interest in the Court's disposition of this case.

INTRODUCTION

The Boat Safety Act, 46 U.S.C. §§ 4301-4311 (1994), contains two provisions relevant to the preemption issues presented in this case.

Section 4306, entitled "Federal preemption," provides:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

Section 4311, entitled "Penalties and injunctions," provides in subsection (g):

> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

The preemption issues presented in this case require the Court to reach a sensible and harmonious construction of these two provisions. *Amicus curiae* General Motors respectfully submits that the positions taken by petitioners and the Solicitor General fail in this task. This brief is being submitted to respond to the points discussed not only in petitioners' brief, but also in the Solicitor General's brief.

SUMMARY OF ARGUMENT

1. The Boat Safety Act delegates implementing authority to regulate the design and performance of boats and associated equipment, which the Coast Guard exercised by adopting extensive and detailed regulations. As the Solicitor General notes, section 4306 of the statute expressly preempts the field of state laws and regulations imposing standards or requirements with respect to the design and performance of boats and associated equipment, with only three exceptions: the States may enforce laws that are identical to federal regulations; they may apply for authorization to enforce differing laws; and they may regulate the carrying or use of marine safety articles to meet uniquely hazardous local conditions, unless this authority is specifically disapproved.

If none of these exceptions applies, the Boat Safety Act explicitly preempts state law governing boat design and performance -- regardless of whether a federal regulation governs that same aspect of boat design or performance. Here, the Coast Guard has not required propeller guards on outboard motors. The State of Georgia has not obtained authorization to require propeller guards and does not claim that they would address any uniquely hazardous local

conditions. Therefore, petitioners' tort claim based on respondent's failure to install propeller guards is expressly preempted.

2. Petitioners and the Solicitor General counter that state common law damages actions enjoy a blanket immunity from this straightforward preemption analysis because state common law is not a state "law or regulation" and does not impose any legal "standard" or "requirement" within the meaning of this clause. That is wrong. The Court has rejected their argument at least thrice, by holding that broad terms in a preemption clause such as "standard[s]" and "requirement[s]" encompass state common law. *See, e.g.*, *Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2259-60 (1996) (Breyer, J., concurring in part and concurring in judgment); *id.* at 2262 (O'Connor, J., concurring and dissenting in part); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 520-24 (1992) (Stevens, J., plurality opinion); *id.* at 548-49 (Scalia, J., concurring and dissenting in part). Petitioners and the Solicitor General offer no justification for the Court to overrule this line of decisions, which forecloses their position.

Even putting aside this controlling precedent, the position taken by petitioners and the Solicitor General ignores the fact that state common law is an integral part of the corpus of state law, and it sets "standards" and "requirements" that govern private conduct quite as much as state positive law does. Their argument also rests on the bizarre assumption that Congress intended a single state jury -- an *ad hoc* collection of citizens assembled to hear one case -- to have more power to regulate private conduct in a manner different from the federal government than do their duly elected and appointed state officials. Finally, their suggested misreading of the statutory language, if accepted, would undermine the settled holding of cases as basic as *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

3. Petitioners and the Solicitor General further contend that the so-called "savings" clause in the Boat Safety Act negates its explicit preemption of common law tort suits. That, too, is incorrect. The preemption clause contains its own savings provisions, which operate to save state law from preemption where it is identical to federal law, where authority is granted to enforce differing state laws, and in limited circumstances to address uniquely hazardous local conditions. What petitioners and the Solicitor General call a "savings" clause -- section 4311(g) -- is more appropriately viewed as an "anti-affirmative-defense" clause. It says nothing about the kinds of state laws that are preempted. Instead, it simply disclaims any federal immunity from liability at state law, which thus frees each State to determine for itself whether compliance with pertinent federal requirements (the "government standards" defense) will be recognized as an affirmative defense in an otherwise permissible state-law cause of action. The claim that this provision should be read instead as a broad "anti-preemption" clause is untenable and cannot be squared with the plain language of the statute.

In any event, the Court has repeatedly held that the general language of a so-called "savings" clause cannot negate the plain terms of an explicit preemption clause. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992). More generally, the Court has routinely given these general clauses a narrow reading in order to render them consistent with the preemptive thrust of the statute as a whole. *See, e.g., Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51-52 (1987).

4. Moreover, petitioners' claims also fail under an implied-conflict preemption analysis. As the Court has consistently held in several recent decisions, the mere existence of a clause directed at preemption in the Boat Safety Act does not eliminate the need for such analysis. *See Medtronic*, 116 S. Ct. at 2259 (plurality opinion) (implied-

conflict preemption inquiry is proper); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287-88 (1995) (conducting such an inquiry); *CSX*, 507 U.S. at 673 n.12 (same). In addition, the so-called "savings" clause does not preclude implied-conflict preemption analysis, as the Court has long held. *See, e.g., International Paper Co. v. Ouellette*, 479 U.S. 481, 493-94 (1987); *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907). Unlike petitioners, the Solicitor General accepts this established approach, and there is no reason for the Court to strike out in a different direction in this case.

Here, accepting the Court of Appeals' view that the Coast Guard made a considered decision not to regulate propeller guards on recreational vessels, in furtherance of its mission to promote boat safety, the necessary result is that any such requirement imposed by state law is impliedly preempted. *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978). Indeed, as a practical matter it would be unfair and unworkable to hold manufacturers liable for any penalties, fines, or compensatory or punitive damages imposed under state law for conforming the design of their vessels to the federal agency's explicit determination that requiring them to be equipped with propeller guards would undermine the public safety.

ARGUMENT

I. THE BOAT SAFETY ACT PREEMPTS THE FIELD OF STATE LAW GOVERNING THE DESIGN AND PERFORMANCE OF RECREATIONAL VESSELS AND ASSOCIATED EQUIPMENT.

The Solicitor General points out that the plain language of the Boat Safety Act, its legislative history, and its subsequent administrative history all support the view that the statute is intended to preempt the field of state laws regulating the design and performance of recreational vessels and their associated equipment, subject only to certain

exceptions that are specified in the statute itself. Strangely, however, the Solicitor General does not draw the conclusion that the Boat Safety Act actually *has* this effect, for reasons that will be discussed in more detail in Sections II and III, *infra*.

As the Solicitor General explains, the text of the Boat Safety Act appears expressly to preempt the field of state laws regulating the design and performance of recreational vessels and their associated equipment, subject only to three exceptions that are set forth in the preemption clause itself. *See* U.S. Br. 14; 46 U.S.C. § 4306. First, Congress has authorized the States to enforce laws that are "identical" to regulations adopted by the Secretary. Second, the States may apply to the Secretary for authorization to enforce differing laws. Third, the States may regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State, unless the Secretary specifically disapproves. *See id.*

If none of these exceptions applies, the Boat Safety Act, by its terms, preempts state law governing the design and performance of recreational vessels and their associated equipment -- regardless of whether a federal regulation governs that same aspect of boat design or performance. It thus differs from the Motor Vehicle Safety Act at issue in *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287-88 (1995), which preempts state law only where a federal regulation concerning the same aspect of performance is in effect. *Myrick* is thus irrelevant to the express preemption issue raised in this case.

As the Solicitor General further notes, this reading of the broad preemption clause contained in the Act is confirmed by its legislative history. *See* U.S. Br. 14. The Senate Report on the proposed legislation stated that it was intended to have broad preemptive effect, explaining the preemption clause as follows:

> This section provides for federal preemption in the issuance of boat and equipment safety standards. This conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce. In this case it also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements. . . . The section does not preempt state law or regulation directed at safe boat operation and use, which was felt to be appropriately within the purview of state or local concern.

S. Rep. No. 92-248, at 20 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1341. The Report emphasized that the "need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of *uniform* construction and equipment standards at the Federal level." *Id.* at 14 (emphasis added). While the language of the Act phrased the Secretary's obligation to issue regulations in permissive rather than mandatory terms, "the Committee expect[ed] that initial standards will be promulgated as soon as practicable." *Id.* at 17. "It was precisely to take advantage of the expertise and flexibility available in the administrative process in these regards, and the possibility for continuous review and updating of the standards, that the Committee opted for a system of administrative rather than statutory standards." *Id.*

The Solicitor General also explains that this construction of the preemption clause accords with the administrative history implementing the Boat Safety Act. *See* U.S. Br. 14-15. The day after the Act was signed into law, the Secretary issued a statement exempting all existing state "laws and regulations" from preemption under the express language of the new statute. 36 Fed. Reg. 15,764-65 (Aug. 11, 1971). The Secretary noted that he was acting under the authority

conferred by Congress, which provided that the Secretary "may, if he considers that boat safety will not be adversely affected, issue exemptions from any provision of this Act or regulations and standards established thereunder, on terms and conditions as he considers appropriate." *Id.* (quoting 46 U.S.C. § 4305). Because "[b]oating safety will not be adversely affected by continuing in effect those existing laws and regulations," the Secretary exempted each State from the operation of the express preemption clause, which "prohibit[s] any of those jurisdictions from continuing in effect or enforcing any provision of law or regulation that is not identical to a Federal regulation." 36 Fed. Reg. at 15,765. The exemption was to remain in effect "until expressly superseded, revoked, or otherwise terminated." *Id.*

About a year later, the Coast Guard exercised the authority delegated by the Secretary to issue voluminous regulations governing boat safety pursuant to 46 U.S.C. § 4302. *See* 37 Fed. Reg. 15,777-85 (Aug. 4, 1972). These regulations cover a broad spectrum of safety matters, such as design standards for horsepower, electrical, fuel, ventilation, and start-in-gear systems, requirements for safety equipment to be carried on boats, and measures to correct especially hazardous conditions. *See, e.g.*, 33 C.F.R. Pts. 175, 177, 181, 183 (1997). Thereafter, the Coast Guard proposed to replace the previous blanket exemption from preemption with a more limited provision, noting that "[t]he issuance of these regulations removes the necessity for an exemption to the prohibitions of [the Act's preemption clause] concerning performance or other safety standards for boats." *See* 38 Fed. Reg. 71 (Dec. 27, 1972). The blanket exemption from preemption for state laws concerning boat performance or safety standards was eventually eliminated. *See* 38 Fed. Reg. 6914-15 (Mar. 8, 1973).

Both the legislative history and subsequent administrative history implementing the Boat Safety Act thus reinforce the plain language of the preemption clause. That provision

operates to preempt all state laws that are not "identical" to federal regulations, unless they concern certain uniquely hazardous local conditions or unless the Secretary specifically confers additional authority to act.[2]

Here, the Court's application of the statute's preemption analysis is relatively uncomplicated. The Coast Guard has not required manufacturers to install propeller guards on outboard motors. The State of Georgia has not obtained authorization from the Secretary to require manufacturers to install propeller guards, and no claim has been made that they would address any uniquely hazardous local conditions. Petitioners' tort claim based on respondent's failure to install propeller guards thus is expressly preempted by the Boat Safety Act.

The Solicitor General tries to avoid this straightforward conclusion by arguing that: (1) the preemption clause contained in section 4306 of the Boat Safety Act does not encompass "standards" and "requirements" imposed by state common law; and (2) in any event, section 4311(g) of the Boat Safety Act should be read to override the preemption clause and to preserve all state common law. *See* U.S. Br. 13-25. These arguments are incorrect, as shown in Sections II and III, *infra*.

II. THE PREEMPTION CLAUSE APPLIES TO REQUIREMENTS IMPOSED BY STATE COMMON LAW AS WELL AS THOSE IMPOSED BY STATE STATUTE OR RULE.

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[2] Contrary to the assertions made by the Solicitor General, *see* U.S. Br. 14-15, nothing in the administrative history implementing the Act suggests that the exemptions to preemption granted first by the Secretary and later by the Coast Guard do not apply to state common law. Indeed, the Coast Guard explained its later, more limited, exemption by noting that it "will *principally* [but not solely] affect State statutes and regulations." 38 Fed. Reg. at 6914 (emphasis and bracketed material added). *See also infra* Sections II & III.

The preemption clause in the Boat Safety Act states that no State may "establish, continue in effect, or enforce a law or regulation" establishing a "performance or other safety standard" or imposing such a "requirement" for recreational vessels and their associated equipment, which is "not identical to" a regulation prescribed by the Coast Guard under the Act. 46 U.S.C. § 4306. Petitioners and the Solicitor General contend that this provision encompasses only "state legislative and administrative enactments," but not common law. Petrs. Br. 13; U.S. Br. 11-12. They thus argue that *all* common law damages actions -- regardless of whether they set requirements or standards that differ from a federal requirement that is directly applicable -- are immune from a claim-by-claim determination of whether they are preempted under the Act. This extreme position is wrong, for a number of reasons.

First, the Court has rejected this very argument in three cases, holding that the use of terms such as "law," "standard," and "requirement" in a preemption provision plainly covers standards and requirements set by common law damages actions. *See Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2259-60 (1996) (Breyer, J., concurring); *id.* at 2262 (O'Connor, J., concurring and dissenting in part); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 520-24 (1992) (Stevens, J., plurality opinion); *id.* at 548-49 (Scalia, J., concurring and dissenting in part). The sound reasons for the Court's repeated holding on this interpretive point compel adherence to *stare decisis* as the Court addresses it once again in this case.[3]

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[3] The Solicitor General directly disagrees with the holdings of these cases, *see* U.S. Br. 17-18 & n.9, yet never offers any plausible basis for overruling them. For their part, petitioners essentially ignore the Court's holdings in *Medtronic*, *CSX*, and *Cipollone* when discussing this point. *See* Petrs. Br. 24-28.

In *Cipollone*, the Court was obliged to construe the express preemption provisions contained in two successive federal statutes -- the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282 (1965), and the Public Health Cigarette Smoking Act of 1969, 84 Stat. 87. The Court determined that in the preemption clause in the 1965 Act, "Congress spoke precisely and narrowly: 'No statement relating to smoking and health shall be required in the advertising of [properly labeled] cigarettes.'" *Cipollone*, 505 U.S. at 518 (quoting section 5(b) of the 1965 Act). The Court noted that this language was consistent with "the continued vitality of state common law damage actions," and was "best read as having superseded only positive enactments by legislatures or administrative agencies that mandate particular warning labels." *Id.* at 518-19.

The Court held, however, that Congress changed the situation dramatically by enacting the "much broader" preemption clause contained in the 1969 Act. 505 U.S. at 520. That provision introduced new constraints upon all manner of requirements, duties, and standards imposed under state law by stating that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes" that are labeled as required under federal law. 15 U.S.C. § 1334(b). Based on this language -- particularly the reference to "requirement[s] or prohibition[s] . . . imposed under State law" -- the Court held that common law actions were within the coverage of the preemption clause in the 1969 Act. 505 U.S. at 520-24.[4]

In *Cipollone*, therefore, the Court specifically rejected the linguistic argument urged by petitioners here in an attempt to limit the scope of terms such as "standard" and "requirement"

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[4] The plurality opinion on this point actually speaks for the majority, for it is reinforced by the express agreement of Justices Scalia and Thomas. *See* 505 U.S. at 548-49 (Scalia, J., concurring and dissenting in part).

to exclude the effects of damage actions brought under state common law. The Court explicitly found this argument to be "at odds both with the plain words of the 1969 Act and with the general understanding of common law damages actions." 505 U.S. at 521. In a key passage that squarely resolves this issue, the Court stated: "The phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules." *Id.* Even though there was some evidence in the legislative history suggesting that Congress "was primarily concerned with positive enactments by States and localities," the Court was emphatic that "the language of the Act *plainly* reaches beyond such enactments." *Id.* (emphasis added).[5]

The Court dispatched the same argument more briefly in the *CSX* case, where it considered the preemptive effect of the Federal Railroad Safety Act of 1970, 84 Stat. 971. The preemption clause contained in that statute provided that applicable federal regulations would preempt any state "law, rule, regulation, order, or standard relating to railroad safety." 45 U.S.C. § 434.[6] In a single sentence, the Court treated the

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[5] Justice Scalia's separate opinion, joined by Justice Thomas, expressly agreed that the broader language of the 1969 Act "plainly reaches beyond [positive] enactments," and "general tort-law duties" can impose requirements or prohibitions within the meaning of the 1969 Act. *See* 505 U.S. at 548-49 (Scalia, J., concurring and dissenting in part) (brackets in original).

[6] The Railroad Safety Act's preemption clause provided that "[a] State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement," but included an exception for "an additional or more stringent [state] law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety

(continued...)

issue as settled, flatly stating that "[l]egal duties imposed on railroads by the common law fall within the scope of these broad phrases." 507 U.S. at 664 (citing *Cipollone* plurality and concurrence). No member of the Court dissented from this proposition.

In *Medtronic*, the Court addressed the Medical Device Amendments of 1976, 90 Stat. 539, which contained a preemption clause barring any State from "establish[ing] or continu[ing] in effect" any "requirement" relating to the safety or effectiveness of a medical device that differed from any applicable Federal requirement. 21 U.S.C. § 360k(a). Plaintiffs argued that "common-law duties are never 'requirements'" within the meaning of the statute, and that the statute "therefore never pre-empts common-law actions." 116 S. Ct. at 2258 (Stevens, J., plurality opinion).

A majority of the Court directly rejected this argument. Justice Breyer, in a separate concurrence, stated that "[o]ne can reasonably read the word 'requirement' as including the legal requirements that grow out of the application, in particular circumstances, of a State's tort law." 116 S. Ct. at 2259 (Breyer, J., concurring). After setting forth the Court's holdings to the same effect in *Cipollone* and *CSX*, Justice Breyer observed that the same rationale "would seem applicable to the quite similar circumstances at issue here." *Id.* at 2259. He also agreed on this point with Justice O'Connor's separate opinion for four Justices, which held that state common law actions impose "requirements" because they "operate to require manufacturers to comply with common-law duties." *Id.* at 2262 (O'Connor, J., concurring and dissenting in part) (citing *Cipollone*). The other Justices found it unnecessary to address the issue, since none of plaintiffs' claims was preempted in any event. *Id.* at 2259

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[6](...continued)
hazard," when "not incompatible" with Federal law. 45 U.S.C. § 434; *see* 507 U.S. at 662 n.2.

(Stevens, J., plurality opinion). The conclusion reached by the five Justices who addressed the question thus constitutes yet another holding that common law claims impose state law "requirements" within the meaning of such an explicit preemption clause. *See generally Marks v. United States*, 430 U.S. 188, 193-94 (1977) (majority of Justices reaching conclusion by way of "fragmented" opinions state "the holding of the Court").[7]

It bears mention that the Government's position in this case is flatly inconsistent with the position in *Medtronic*, where the Solicitor General stated: "[W]e do not agree with respondents' broad submission that the act's preemption provision does not speak at all to common law tort claims. In our view, the word 'requirement' in section 521(a) of the act encompasses duties imposed by State common law, as well as duties imposed by State statutory or regulatory law." Transcript of Oral Argument, *Medtronic* (No. 95-754), at 45. There the Solicitor General added that "*Cipollone* and the use of the requirement there, and just the nature of State law . . . would also encompass duties imposed by the . . . law from whatever source." *Id.* at 46. The Government offers no explanation for this abrupt about-face from its position in *Medtronic*.

Second, even if petitioners' argument were not squarely foreclosed by these prior decisions, it is still plainly wrong because it ignores the ordinary interrelations between the substantive principles of the common law and statutory law in regulating the health, safety, and welfare of citizens in

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[7] In addition, the Court has frequently held that the term "standards" refers to state common law as well as state positive law. *See, e.g., Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 114-15 (1987) (referring to "safety standards" set by California products liability law); *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 400 (1965) (referring to "common law standards"); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630-31 (1959) (referring to "standard of care" imposed by common law).

each state. Again, the Court discussed this point in *Cipollone*, and pointed out that "common law damages actions of the sort raised by petitioner are premised on the existence of a legal duty and it is difficult to say that such actions do not impose 'requirements or prohibitions,'" for "it is the essence of the common law to enforce duties that are either affirmative requirements or negative prohibitions." 505 U.S. at 522; *see also Medtronic*, 116 S. Ct. at 2262 (O'Connor, J., concurring and dissenting in part) (state common law actions constitute "requirements" where they "operate to require manufacturers to comply with common-law duties").

In this regard, it simply does not matter whether the *remedy* used to enforce the substantive component of the state law is the payment of damages to private parties rather than the payment of fines to the government or some other enforcement mechanism. "Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 247 (1959). The Court recently reaffirmed this position. *See BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1598 n.17 (1996) ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute.").

The intricate relationship between state common law and state statutory and administrative law in regulating private conduct, and the extent to which they are inherently interwoven, is widely understood and readily demonstrated. Earlier in this century, the courts typically led the way on health and safety issues by applying and developing common law principles to regulate the private sector. The requirements, obligations, and standards imposed in accordance with these principles, in turn, were eventually

codified and at times modified by state legislatures when they took the initiative to address particular concerns. On occasion, legislatures have enacted regulatory statutes conferring administrative authority on government agencies to regulate private conduct directly, while still retaining the common law to fill the remaining gaps between these positive enactments. The further interaction of state legislation and state common law adjudication often is even more complex, as legislative or regulatory enactments may be used to supply the duty of care underlying private damage actions. *See generally* Melvin Eisenberg, *The Nature of the Common Law*, (1988); Guido Calabresi, *A Common Law for the Age of Statutes* (1982).[8]

At the state level, therefore, it is undeniable that the common law forms an integral part of the law's comprehensive regulation of private conduct. Taken in combination with statutory and regulatory enactments, the common law imposes a continual procession of legal "requirements," obligations, prohibitions, and "standards" that are designed to influence and regulate the actions of businesses and individual citizens. *See, e.g., Medtronic*, 116

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[8] The Solicitor General offers a strained construction of the statutory phrase "State or political subdivision" that would appear to read the courts entirely out of the framework of state governments. *See* U.S. Br. 18-19. This approach overlooks the fact that the statute in *Medtronic* contained the same phrase ("State or a political subdivision"), and a majority of the Court held that its preemption clause reached common law claims. In the same passage, the Solicitor General suggests that if state courts wished to apply state common law standards or requirements to the design or manufacture of recreational vessels and associated equipment, it would be absurd to expect state judges to apply for federal authorization to do so. *Id.* We agree that the suggestion is absurd; it also is *irrelevant*. As with the state legislatures, the state courts have authority to act only where state law is not preempted; any application for an exemption from preemption to the governing federal agency -- here, the Coast Guard -- would be made by state executive officials. Neither state legislators nor state judges would be expected to make this application.

S. Ct. at 2262 (O'Connor, J., concurring and dissenting in part) ("state common-law damages actions operate to require manufacturers to comply with common-law duties"). Any reading of these terms that would pose a putative distinction between common law and positive law in this respect would be fundamentally misguided. *See id.* at 2259 (Breyer, J., concurring) ("The effects of the state agency regulation and the state tort suit are identical.").

Third, the argument presented by petitioners and their *amici* rests on the odd assumption that Congress intended an *ad hoc* collection of state citizens assembled to hear one civil case -- a jury -- to have greater power to set standards that differ from Federal law than do sovereign state officials acting through the careful, deliberative processes established in the legislative and administrative spheres. Such a result would be a perverse undermining of the democratic process, and the Court should not assume that Congress intended "this anomalous result" unless it clearly so provided. *See Medtronic*, 116 S. Ct. at 2260 (Breyer, J., concurring). Certainly nothing in the language of the Boat Safety Act requires this upside-down worldview. Indeed, for the reasons stated above, section 4306 plainly contemplates that state juries, just like state administrative and legislative officials, set "standard[s]" and "requirement[s]" that may therefore be preempted by federal regulatory action. *Cf. New York Times v. Sullivan*, 376 U.S. 254, 265 (1964) (the "test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised").

Indeed, petitioners' argument on this point is so plainly wrong that, if accepted here, its logic would partially overrule *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). The very same argument that petitioners and their *amici* put forward with respect to the text of section 4306 would apply equally well to the term "laws" in the Rules of Decision Act, 28 U.S.C. § 1652. The Rules of Decision Act requires a federal court to apply "[t]he laws of the several states" as the rules of

decisions in civil actions not arising under federal law. Applying the logic of petitioners' argument, because the Supremacy Clause refers also to "the *Laws* of the United States," U.S. Const. art. VI, cl. 2 (emphasis added), and because there is no general common law of the United States, then the phrase "the laws of the several states" should be limited to the *positive* law of the several states, thereby excluding state common law as the governing rules of decision in federal courts. Adoption of petitioners' argument thus would have the pernicious consequence of upsetting the entire interpretive basis for the longstanding and important *Erie* doctrine.

It is therefore not surprising that, in *Cipollone*, the Court rejected the parallel argument that the phrase "State law" included *only* state statutes and regulations, but not state common law. *See* 505 U.S. at 522-23; *see also id.* at 549 (Scalia, J., concurring and dissenting in part) (agreeing that the phrase "State law" used in the 1969 Act "embraces state common law"). The Court recognized that this argument was flatly irreconcilable with its longstanding construction of the same basic language in the Rules of Decision Act. *See Erie*, 304 U.S. at 77-78. Indeed, the Court indicated no desire to revisit the controversial battles fought over many decades that led up to the Court's historic decision in *Erie* to overrule the contrary interpretation of the Rules of Decision Act that had been adopted in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). Instead, the Court simply noted that "we have recognized the phrase 'state law' to include common law as well as statutes and regulations." *Cipollone*, 505 U.S. at 522. For all the same reasons, the efforts made by petitioners and the Solicitor General to limit the terms "requirement[s]" and "standard[s]" to state positive law must fail.

III. SECTION 4311(g) SIMPLY CONCERNS THE EFFECT OF COMPLIANCE WITH FEDERAL LAW, AND DOES NOT LIMIT THE SCOPE OF THE PREEMPTION CLAUSE.

The Boat Safety Act contains what some have called a "savings" clause, which states that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). Petitioners and the Solicitor General contend that this provision establishes that the common law is beyond the reach of the preemption clause. *See* Petrs. Br. 28-31; U.S. Br. 21-24. But that does not square with the relation between the preemption clause and this provision, with the text of this provision, or with the clear purpose of this provision, as explained by Congress.

Section 4311(g) does not serve the purpose of "saving" state law or state common law from preemption at all. Indeed, the preemption clause contains its own savings provisions, which are explicitly designed to specify when state law is preserved in the face of the broader general language of the preemption clause. Those provisions operate to save state law from preemption in three distinct circumstances.

First, the States may apply their own law where it is "identical to a regulation prescribed" under federal law. 46 U.S.C. § 4306. This provision is similar to one at issue in *Medtronic*, where the Court unanimously held that the preemption clause permitted state laws and state requirements to be enforced where they are identical to federal law. *See* 116 S. Ct. at 2255; *id.* at 2264 (O'Connor, J., concurring and dissenting in part).

Second, the States may apply to the Secretary for permission to apply their own law even where it differs from federal law. *See* 46 U.S.C. § 4306. This provision

establishes an avenue for each State to seek approval, on a state-by-state basis, for exemption from the statutory prohibition on enforcing inconsistent state laws if a particular matter is thought to warrant an exemption.

Third, the States are explicitly permitted to apply their own law to "regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State," unless the Secretary specifically disapproves of their doing so. 46 U.S.C. § 4306. This one narrow area of explicit state authority is clearly circumscribed, thus reinforcing the otherwise restrictive impact of the broad preemption clause.

Moreover, section 4311(g) says nothing about the kinds of state laws that are preempted or saved from preemption. Rather, it simply disclaims any possibility that a manufacturer will be able to assert a federal immunity from liability at state law based on its mere compliance with the requirements imposed by federal law. This provision thus works in tandem with the preemption clause by ensuring that the boundaries of federal preemption are not improperly expanded by a broad "government standards" defense, which might be asserted to impede the enforcement of otherwise valid state law. Thus, it would be much more appropriate to refer to this provision as an "anti-affirmative-defense" clause, which operates to preserve state authority on how to treat the issue of a manufacturer's compliance with pertinent federal standards and requirements. For example, where state common law addresses "uniquely hazardous" local conditions, as expressly permitted by the statute, this clause would ensure that federal law is understood to place no limits on how state courts treat the issue of compliance with any federal requirements.

Section 4311(g) thus should not be misread as an "anti-preemption" clause. To the contrary, Congress declared in this provision that where a state-law cause of action is not preempted by federal law, it is impermissible for a party or

a court to accomplish the same end by citing the party's compliance with all pertinent federal requirements as the basis for an affirmative defense or immunity asserted to defeat the same state-law cause of action. In this manner, Congress specified that unless state common law is actually *preempted*, it cannot be circumscribed by legal inferences that might otherwise be drawn about a party's *conduct* in exercising due care by complying with the federal regulatory scheme. *See, e.g.*, *Restatement (Third) of Torts: Products Liability* § 4, cmt. e (proposed final draft Apr. 1, 1997) (explaining the "important distinction" between "the matter of federal preemption of state products liability law" and "the question of whether and to what extent, as a matter of state tort law, compliance with product safety statutes or administrative regulations affects liability for product defectiveness").

The Senate Report accompanying the Act confirms this interpretation. Congress intended, with respect to section 4311(g), that "mere compliance . . . with the minimum standards promulgated under the Act will not be a complete defense to liability. Of course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for its evidentiary use." S. Rep. No. 92-248, at 32 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1352. The references to "not . . . a complete defense" and "evidentiary value" further establish that this provision simply ensures that the States will have the flexibility to determine whether a party's compliance with pertinent federal requirements can serve as the basis for an affirmative defense or immunity asserted to defeat an otherwise permissible state-law cause of action. In practice, the States differ in their views of such an affirmative defense,

and on the admissibility of evidence of compliance with federal standards on the issues of defectiveness and due care.[9]

The contrary reading of this provision proposed by petitioners would, in addition, flout Congress' intention that "[t]he need for *uniformity* in standards if interstate commerce is not to be unduly impeded supports the establishment of *uniform* construction and equipment standards at the Federal level" and that "manufacture for the domestic trade will *not* involve compliance with widely varying local requirements." S. Rep. No. 92-248, at 14, 20 (emphases added).

The erroneous construction of section 4311(g) urged upon the Court by petitioners and the Solicitor General is further underscored by their failure to come to grips with the actual language of the clause, which states that "[c]ompliance with . . . this chapter does not relieve a person from liability *at common law or under State law*." 46 U.S.C. § 4311(g) (emphasis added). Although they make much of the fact that Congress used the term "common law" in this provision, they completely ignore the fact that Congress also referred to all of "state law" in the same passage. If petitioners' reading of this provision were to be adopted, then it would become a

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[9] Each State thus remains free to determine for itself whether compliance with pertinent federal requirements (the "government standards" defense) is a relevant factor or an affirmative defense under state law in adjudicating an otherwise permissible state-law cause of action. There are diverse views on this issue under state law. Some States recognize a rebuttable presumption that a product which complies with federal standards is not defective. *E.g.*, Mich. Comp. L. Ann. § 600.2946(4) (West 1997); Kan. Stat. Ann. § 60-3304(a) (1996). Others hold compliance with federal standards is relevant to whether there is a defect, but not conclusive or presumptive evidence. *E.g.*, *Wagner v. Clark Equip. Co.*, 700 A.2d 38, 49-50 (Conn. 1997); *Brooks v. Beech Aircraft Corp.*, 902 P.2d 54, 63 (N.M. 1995). A few States may hold that compliance conclusively negates any defect, *see, e.g.*, *Beatty v. Trailmaster Prods.*, 625 A.2d 1005, 1013-14 (Md. 1993), while others may treat compliance as irrelevant and inadmissible, *see, e.g.*, *Sheehan v. Cincinnati Shaper Co.*, 555 A.2d 1352, 1355 (Pa. Super. 1989).

complete "anti-preemption" clause, and *all* state law -- whether statutory, administrative, or judge-made -- would remain in effect as a basis for imposing liability, thus completely nullifying the plain import of the preemption clause. Thus, petitioners' strained attempt to find deeper meaning in the omission of the term "common law" from the preemption clause and its inclusion in the so-called "savings" clause, *see* Petrs. Br. 30, rests on a clear distortion of the statutory text.

In addition, as Justice Breyer explained in *Medtronic*, the position urged by petitioners and their *amici* "would have anomalous consequences." 116 S. Ct. at 2259 (Breyer, J., concurring). It would permit "the liability-creating premises of the plaintiffs' state law tort suit" to operate in direct conflict with federal law, whereas state agency regulations could not. *Id.* at 2261. Yet the practical "effects of the state agency regulation and the state tort suit are identical." *Id.* at 2259; *see also supra* Section II.

Finally, the Court's prior cases have consistently held that the general language of a so-called "savings" clause cannot negate the terms of an explicit preemption clause. The Court has frequently been faced with potentially competing preemption and general savings clauses, and has given the latter provisions limited effect in the context of the statutory scheme as a whole. For example, in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), the Court held that a "general 'remedies' saving clause cannot be allowed to supersede the specific substantive preemption provision." *Id.* at 385. Indeed, the Solicitor General had urged this reading upon the Court:

> [The savings clause] is properly construed only to preserve those remedies not inconsistent with other provisions of the statute, including [the] express preemption provision. That is the interpretation that this Court has long placed on a comparable savings clause in the Interstate Commerce Act.

> *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129-30 (1915).

Brief for the United States as *Amicus Curiae* Supporting Respondents, *Morales* (No. 90-1604), at 16.

More generally, the Court has routinely given so-called "savings" clauses a narrow reading in order to render them consistent with the preemptive thrust of the statute as a whole. *See, e.g., American Airlines v. Wolens*, 513 U.S. 219, 222 (1995) (state fraud suit expressly preempted notwithstanding savings clause providing that statute does not "abridge or alter the remedies now existing at common law or by statute"); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51-52 (1987) (savings clause given narrow reading after the Court looked "to the provisions of the whole law, and to its object and policy"). Indeed, just two days ago, the Court held again "'it is a commonplace of statutory construction that the specific'" language concerning such matters as preemption "'governs the general' terms of the saving clause." *South Dakota v. Yankton Sioux Tribe*, No. 96-1581, slip op. at 17 (U.S. Jan. 26, 1998) (quoting *Morales*, 504 U.S. at 384)).[10]

Therefore, section 4311(g) of the Boat Safety Act cannot properly be read to nullify or abridge the explicit terms of the preemption clause.

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[10] The Solicitor General's suggestion that the federal safety standards should be understood as mere "minimum" standards, *see* U.S. Br. 20-21, proves too much, for it would exempt all state law from the reach of the preemption clause. Indeed, the only limit that the Solicitor General appears to place on this approach is supposedly premised on the language of section 4311(g), though once again he fails to recognize that the phrase "at common law" is followed by the phrase "or under State law." *See id.* at 21; *see also Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 168 n.19 (1978) (rejecting argument that because statute referred to "minimum standards," it "requires recognition of state authority to impose higher standards").

IV. PETITIONERS' CLAIMS ALSO ARE SUBJECT TO IMPLIED-CONFLICT PREEMPTION ANALYSIS AND ARE IMPLIEDLY PREEMPTED.

Even if not expressly preempted, petitioners' claims would fail under an implied-conflict preemption analysis.

Petitioners briefly assert that the Court should not conduct any implied preemption analysis in this case because the Boat Safety Act contains a preemption clause. *See* Petrs. Br. 31-32. Notably, the Solicitor General appears to disagree with this assertion, for his brief devotes considerable space to the customary inquiry into implied-conflict preemption in an effort to explain its view that petitioners' claims are not impliedly preempted in this case. *See* U.S. Br. 25-30.

In fact, this Court's precedents have already established that the judicial inquiry into implied-conflict preemption, which is dictated by the Supremacy Clause, is proper when courts are applying the federal regulatory safety laws. At one time, a passage from the plurality opinion in *Cipollone*, *see* 505 U.S. at 517, had been misinterpreted so as to create confusion on this point. The Court seemed to settle the issue in *CSX*, when it conducted an implied-conflict preemption analysis even though the federal railway safety statutes included a preemption clause. *See* 507 U.S. at 673 n.12.

Nevertheless, some lower courts continued to dispute the issue. When the Court granted review in *Myrick*, therefore, the parties addressed it and the Court squarely resolved it:

> According to respondents and the Court of Appeals, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), held that implied pre-emption cannot exist when Congress has chosen to include an express preemption clause in a statute. *This argument is without merit*.

514 U.S. at 287 (emphasis added). The Court specifically noted that it had in fact "engaged in a conflict pre-emption

analysis" in *Cipollone* itself, *id.* at 289, and had done so again in *CSX*, notwithstanding the existence of a preemption clause in the statutes at issue in both of those cases, *see id.* After thus conclusively deciding the issue, the Court went on to conduct an implied-conflict preemption inquiry under the motor vehicle safety statutes, which include both a preemption clause and a clause addressing the effect of compliance with federal standards and requirements. *See id.* at 287-88.

Finally, in *Medtronic*, the posture of the case decided by the Court was such that it concerned only an issue of express preemption, without any briefing on the issue of implied preemption. *See, e.g.*, 116 S. Ct. at 2251 (plurality opinion). Nonetheless, even the four Justices who gave the preemption clause its narrowest reading pointed out that in considering further questions about express preemption under that statute in the future, "the issue may not need to be resolved if the claim would also be pre-empted under conflict pre-emption analysis." *Id.* at 2259 (citing *Myrick*, 514 U.S. at 289). The statute at issue in *Medtronic*, once again, contained both a preemption clause and a clause addressing the effect of federal compliance.

The Court's repeated endorsements of implied-conflict preemption analysis in the context of federal safety statutes that contain a preemption clause, and often a general savings clause, defeats the argument that such analysis is foreclosed in this case. This approach also accords with the natural effect of the Supremacy Clause. Federal law is unequivocally stated to be "the supreme Law of the Land," U.S. Const. art. VI, cl. 2, and thus any state law which conflicts with federal law is "pre-empted by direct operation of the Supremacy Clause." *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union*, 468 U.S. 491, 501

(1984). The mere inclusion of a preemption clause in a statute cannot uproot the necessary constitutional inquiry.[11]

Moreover, the mere inclusion of a general savings clause in a federal statute cannot nullify the traditional judicial inquiry into implied-conflict preemption.[12] For almost a century, the Court has made clear that even when an Act has no preemption clause at all, a savings clause cannot be read to permit claims that actually conflict with the Act. The principle was first stated in *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907). There, a federal act contained a broad savings clause that purported to save "the remedies now existing at common law or by statute." *Id.* at 446. In spite of that savings clause, the Court held that an existing but conflicting common law claim was preempted because a savings clause "cannot in reason be construed as continuing . . . a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself." *Id.*; *see also International Paper Co. v. Ouellette*, 479 U.S. 481, 485-505 (1987) (state common law claims were impliedly preempted

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[11] Petitioners refer to a supposed "presumption against preemption." Petrs. Br. 24. Where state and federal law collide, the Supremacy Clause settles the matter and there is no place for presumptions, no matter how much the matter may traditionally be in the state domain: "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Free v. Bland*, 369 U.S. 663, 666 (1962); *see also Cipollone*, 505 U.S. at 516 ("state law that conflicts with federal law is without effect"); *id.* at 544 (Scalia, J., concurring and dissenting in part) (same).

[12] The Solicitor General also appears to accept this proposition, for he states that "[u]nder our reading of the savings clause," a common law claim would be preempted by a pertinent federal regulation if it "propounded a standard of conduct directly contrary to the federal rule." U.S. Br. 28.

because they conflicted with the method chosen by federal law to implement the statutory goals, despite broad savings clause); *Chicago & Northwest Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328-31 (1981) (same). Whatever else may be the effect of section 4311(g), it most assuredly cannot, consistent with the Court's decisions, be interpreted to bar implied-conflict preemption.

For purposes of the merits of the inquiry into implied-conflict preemption in this case, *amicus curiae* General Motors accepts the position taken by the Court of Appeals, *see* Pet. App. A15-A21, and presented in more detail by respondents here -- that in the circumstances of this case the Coast Guard made a considered decision not to mandate propeller guards on recreational vessels, because it determined that to do so would disserve the core safety objectives of the Boat Safety Act.[13] On this record, the agency's decision "takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978).[14]

As a practical matter, moreover, it would be unfair and unworkable to hold manufacturers liable for any penalties, fines, or compensatory or punitive damages imposed under state law for conforming the design of their vessels to the governing federal agency's explicit determination that

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[13] The Solicitor General similarly frames the issue as whether the "Coast Guard's *decision* not to regulate propeller guards" results in implied preemption, U.S. Br. 25 (emphasis added), though his explanation of the underlying basis for the agency's decision is somewhat different.

[14] The Solicitor General's efforts to distinguish *Ray*, *see* U.S. Br. 28-29 & n.19, are unpersuasive. First, it cannot matter whether the federal agency is required to act or permitted to act; what matters is simply whether it is *authorized* to act. Second, the regulations imposed under the Boat Safety Act are quite comprehensive. *See, e.g.*, 33 C.F.R. Pts. 175, 177, 181, 183.

requiring them to be equipped with propeller guards would undermine the public safety. The conflicting signals of state and federal policy pose an obvious potential to whipsaw citizens who wish only to abide by the law and policies of their respective governments. There can be little doubt that if any manufacturer had ignored these safety concerns and installed propeller guards, these considerations would have featured prominently in any lawsuit arising from a blunt trauma injury or fatality of the sort described by the agency as the basis for its determination not to mandate propeller guards on recreational vessels.

In sum, the Coast Guard's decision not to require propeller guards because to do so would disserve the core safety objectives of the Boat Safety Act necessarily leads to the conclusion that such a standard or requirement imposed by state positive law or common law is impliedly preempted. *See, e.g.*, *Ray*, 435 U.S. at 178.

CONCLUSION

For the foregoing reasons, as well as those set forth in respondent's brief, the decision below should be affirmed.

Respectfully submitted,

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